IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 21ST NOVEMBER 2007 / 30TH KARTHIKA 1929

SA.No. 654 of 1994(C)

AS.43/1989 of SUB COURT, TIRUR
OS.157/1985 of MUNSIFF'S COURT,PARAPPANANGADI
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APPELLANTS:RESPONDENTS 2,3,4 AND LEGAL REPRESENTATIVES OF DECEASED 1ST PLAINTIFF:

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1. **PATTATHODIKA BEERANKUTTY, S/O.HASSAN THENNALA AMSOM AND APLA DESOM, TIRUR TALUK.**

2. **PATTATHODIKA PATHUMMA, D/O.HASSAN, THIRURANGADI AMSOM AND VENNIYUR DESOM, TIRUR TALUK.**

3. **PATTATHODIKA SAIDALAVI, S/O.HASSAN, THENNALA AMSOM AND APLA DESOM, TIRUR TALUK.**

4. **AYISSA, W/O.MATTAN KUNHIMOHAMMED, ..DO..DO....**

5. **AMINAKUTTY, D/O.DECEASED PATTATHODIKA MOHAMMED ...DO..DO.....**

BY ADV. SRI.P.N.KRISHNANKUTTY ACHAN(SR.)
SRI.A.MANOJ
SRI.T.SETHUMADHAVAN

RESPONDENTS: APPELLANT AND RESPONDENTS 5, 6, 7 AND 8/ DEFENDANTS 1 TO 5:

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1. **MANGADAN SAIDALAVI HAJI, S/O.HYDROSS ALIAS BAPPUTTY, KALARI AMSOM, CHERUSSALA DESOM, TIRUR TALUK.**

2. **KANNADAN ALAVIKUTTY, S/O.MOIDEEN, ..DO..DO....**

3. **KANNADAN HAMZA, S/O. ALAVIKUTTY, ..DO..DO....**

4. **CHEERANGAN KUNHEEN HAJI, S/O.ABDURAHIMAN HAJI, ..DO...THENNALA AMSOM AND APLA DESOM IN TIRUR TALUK.**

5. **PATHATHODIKA MOIDEENKUTTY, S/O.HASSAN, ..DO...DO...**

S.A.NO.654 OF 1994

***ADDL.R6 TO R13 ARE IMPLEADED:**

R6. KUNJAISA AJAMMA,
W/O.LATE CHEERANGAN KUNHEEN HAJI,
THENNALA AMSOM, APLA DESOM, P.O. ARAKKAL,
TIRUR TALUK.

R7. MUHAMMEDKUTTY @ BAVA HAJI,
SON OF LATE CHEERANGAN KUNHEEN HAJI,
...DO...DO...

R8. ABDUL RAHIMAN @ KUNHAVA....DO...DO...

9. AVARANKUTTY, ...DO...DO....

10. MOIDEENKUTTY @ KUNHIMON ...DO..DO...

11. MOOSA, ..DO..DO...

12. IYYATHUKUTTY,
S/O.LATE CHEERANGAN KUNHEEN HAJI,
..DO..DO...

13. SUHARA, ...DO...DO....

(*ADDL.R6 TO R13 ARE IMPLEADED AS PER ORDER DTD. 5/11/2007 IN C.M.P.NO.2449/1998)

BY ADV. SRI.R.RAJESH KORMATH)
SMT.PREETHY KARUNAKARAN)
SMT.MEENA.A.)
SMT.M.R.MINI)
SMT.SAJNA R.NAIR)
SRI.RAHUL VARMA)
SRI.V.S.ROBIN) for R1
SMT.K.R.DEEPA for R5

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 21/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KSS

ORDER ON C.M.P.NOS. 1347/1994 AND 2197/1996 IN

S.A.NO.654/1994

DISMISSED

21/11/2007 **SD/- M.SASIDHARAN NAMBIAR,JUDGE**

/TRUE COPY/

P.A.TO JUDGE

KSS

M.SASIDHARAN NAMBIAR, J.

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S.A.No. 654 OF 1994

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DATED THIS THE 21st DAY OF NOVEMBER, 2007

JUDGMENT

Plaintiffs in O.S. 157 of 1985 on the file of Munsiff Court, Parappanangadi are the appellants. Defendants are the respondents. Appellants originally instituted the suit for permanent prohibitory injunction restraining respondents from trespassing into the plaint schedule property. Plaint schedule property is shown as 0.615 hectares in R.S.206/1 of Thenmala Village of Tirur Taluk having a measurement of 41 X 45 six feet koles. Suit was subsequently got amended and converted into a suit for declaration of title and possession. The case of appellants was that plaint schedule property originally belonged to Irumbuli Mammunni in jenmom right and after his death, it devolved on his children Kunhimoideen, Koyammu and Unneema and their right was purchased by other son Irumbuli Kammu as per Ext.A19 registered deed dated 18.6.1978 and thereafter Irumbuli Kammu transferred his right in favour of

Nharakkal Mattan Marakkar under Ext.A20 registered assignment deed dated 7.2.1905 and after the death of Marakkar, his legal heirs assigned the property in favour of Pariparamban Moideen under Ext.A21 and on the death of Moideen, it was divided between the legal heirs and it was alloted to the share of daughter Ayisumma and under Ext.A1 sale deed which was purchased by Pattathodi Assan and since then Assan has been in possession of the property and on his death, it devolved on appellants and 5th respondent and they are in joint possession of the property and second appellant is residing in the house in the property. It was contended that eastern side of the plaint schedule properties are lying on a higher level and for separating the two properties, there is a ridge and a boundary on the south-west and northern boundaries and on the three sides, there is a boundary wall with a height of three feet made of rubbles and mud and plaint schedule property is lying within the boundary and respondents have

no manner of right or possession over the same and they are not entitled to trespass into the plaint schedule property and as respondents are claiming right over the southern portion of the plaint schedule property stating that they obtained the property from Marakkar, a decree for declaration of title was sought. It was contended that after Ext.A21 assignment deed, legal heirs of Marakkar did not have any portion of the plaint schedule property and respondents cannot claim any portion of the plaint schedule property and even if respondents have any right it is lost by adverse possession and limitation.

2. Fourth respondent/third defendant filed a written statement stating that he has no interest in the property. Respondents 2 and 5 who were defendants 1 and 5 were exparte. Respondents 1 and 3 who were defendants 2 and 4 in their written statement contended that out of the plaint schedule property, 29 ¼ cents belongs to respondents 2 and 3 and Chirangan Alikutty and they divided the property

under Ext.B3 partition deed dated 29.6.1981 and as item No.6, 29 ¼ cents was alloted to the share of Alikutty and while third respondent was possessing the properties, he assigned the property in favour of 1st respondent as per Ext.B1 assignment deed dated 15.1.1985 and appellants have no right, title or possession to the said 29 ¼ cents and therefore appellants are not entitled to the decree sought for.

3. Learned Munsiff, on the evidence of Pws 1 and 2, Dws 1 to 3, Exts.A1 to A22, Exts.B1 to B5 and Exts.C1 to C4, granted a decree declaring that plaint schedule property belong to appellants and fifth respondent and they are in possession of the property and respondents have no manner of right or possession. Respondents 1 to 4 were restrained by a permanent prohibitory injunction from trespassing into the plaint schedule property. Fourth defendant/first respondent challenged the decree before Sub Court, Tirur in A.S.43 of 1989. Learned Sub Judge, on

reappreciation of evidence, found that appellants are claiming right under Ext.A1, and that is the right originally obtained by Kammu under Ext.A19 and later by Moideen under Ext.A21 and the property so obtained is only having an extent of 96 cents with measurement 32 X 36 six feet koles and though under Ext.A1, property transferred was 41 X 45, appellants cannot claim title to that property. Learned Sub Judge also found that measurement of the plaint schedule property can be described in two taks viz, first tak measuring 32 X 36 six feet koles and second tak measuring 39 X 9 six feet koles and appellants can claim only right to first tak with measurement 32 X 36 and they have no title to the disputed portion of the property. The appeal was therefore allowed and suit was dismissed. It is challenged in the second appeal by the plaintiffs.

4. The second appeal was admitted formulating the following substantial questions of law.

1)Whether 'A ' register extract and revenue payments

along with title evidenced by title deeds establish the title put forward by plaintiffs.

2)Whether the features of the property noticed by the Commissioner make out that the property is of the plaintiffs.

3)Whether possession by itself is sufficient to obtain a decree for injunction.

5. Learned senior counsel appearing for appellants and learned counsel appearing for respondents were heard.

6. The argument of the learned senior counsel is that appellants are claiming title under Ext.A1 and respondents are setting up a rival title under Ext.B1 to B4 and when Ext.A21 establishes that the property obtained by Marakkar under Ext.A20 was transferred to Moideen under Ext.A21 by the legal heirs of Marakkar, without retaining any portion of the property obtained under Ext.A20 and Ext.A17 partition deed entered into by the legal heirs of Marakkar does not show that any portion of the property covered under Ext.A20 was available with the legal heirs after

Ext.A21 alienation, respondents are not entitled to claim any right in the plaint schedule property under Ext.A17, A18 or Ext.B4 and B5. It was argued that though Ext.A18 shows a portion of the plaint schedule property is included, they have no right to include the property in Ext.A18 as under Ext.A21 legal heirs of Marakkar had already alienated the entire property obtained under Ext.A20 and therefore courts below should have found that appellants have title to the plaint schedule property. It was argued that when Ext.A19 does not show the survey number, Ext.A20 shows Survey No.64/3 and Ext.A21 shows both old survey no. 64/3 and resurvey No.R.S.206/1. It was argued that Ext.A22 Adangal extract of R.S.206/1 show that the total extent of R.S.206/1 having the old survey No.64/3 with the name Ettukandam paramba is 1 acre 26 cents and the entire property was included in patta No.909 of Pariparamban Moideen, the assignee under Ext.A21 and therefore courts below should have found that the assignor

of appellants under Ext.A1 has title to the entire extent of 1.26 acres in R.S.206/1 and respondents have no right over any portion of the plaint schedule property. It was argued that first appellate court should not have interfered with the decree granted by the trial court and appellants are entitled to the decree for declaration of title and possession. Learned senior counsel also argued that Ext.C1 to C4 establish that the entire plaint schedule property surrounded by old compound walls is the property obtained by the father of appellants under Ext.A1, which is the property originally obtained under Ext.A19 and therefore appellants have title and possession to the property.

7. Learned counsel appearing for respondents argued that appellants can claim title to only the property which Pariparamban Moideen had obtained under Ext.A21 and daughter of Moideen is not competent to transfer more extent than what she obtained as a legal heir of the assignee Moideen under Ext.A21 and appellants cannot

claim title to any extent of the property over and above the extent covered under Ext.A19 to A21. It was pointed out that though Ext.A19 to A21 show that the property obtained thereunder was having a measurement of only 32 X 36 six feet koles and appellants are claiming title to the plaint schedule property on the strength of Ext.A1 with measurement 41 X 45 and the assignor under Ext.A1 cannot assign better title than she did not have. It was therefore argued that appellants can claim title to only the property having measurement of 32 X 36 six feet koles and not 41 X 45 six feet koles and appellants are not entitled to the decree for declaration of title or possession over the disputed portion of the plaint schedule property. It was also argued that under Ext.A18 the disputed property originally belonged to Khathiya Umma and it was assigned in 1942 and subsequently under Ext.B5 partition deed the property was divided and again under Ext.B4 and B5, it was divided and finally it vest with first respondent under Ext.B1

assignment deed dated 15.7.1985.

8. When the suit is based on title, appellants can succeed only on establishing their title. Neither the failure of respondents to prove their title nor the weakness of the defence case will enable appellants to get a decree for declaration of their title. Though title claimed by appellants as legal heirs of the assignee is the one under Ext.A1, the right obtained under Ext.A1 is the right which was originally assigned in favour of Kammu under Ext.A19. The right obtained by Kammu was transferred under Ext.A20 in favour of Marakkar and under Ext.A21, the legal heirs of Marakkar assigned that right in favour of Moideen. Appellants are claiming title under Ext.A1 from daughter of Moideen on the basis that after the death of Moideen, there was a partition and plaint schedule property was alloted to the daughter Ayisumma who in turn assigned it under Ext.A1 to the father of appellants.

9. It is clear that when the measurement of the

properties transferred under Ext.A19 is 32 X 36 six feet koles, measurement shown in Ext.A1 is 41 X 45 six feet koles. The right assigned under Ext.A20 by the assignee of Ext.A19 is also in respect of the property with measurement 32 X 36. The legal heirs of Marakkar assigned the right obtained by Marakkar under Ext.A20, in favour of Moideen under Ext.A21. There also the measurement shown is 32 X 36 and not 41 X 45. There is no pleading that though the property obtained by Kammu under Ext.A19 and by change of hands obtained by Moideen under Ext.A21 was shown as 32 X 36 six feet koles, the property covered within the boundaries shown in the document was having the measurements of 41 X 45 and therefore on the death of Moideen, legal heirs of Moideen obtained title to an extent of the property with measurement 41 X 45 six feet koles. There is also no case that while dividing the property between the legal heirs of Moideen, the properties were measured and it was found that the actual extent available

is not the one shown in Ext.A19 to A21 but 41 X 45 six feet koles and therefore Ayisumma the assignor under Ext.A1 obtained title to the property with measurement 41 X 45 six feet koles and that property was assigned in favour of father of appellants. In fact no such specific case was pleaded. Ext.A1 shows that after Ext.A21 assignment deed, legal heirs of Moideen divided the property as per registered partition deed 1461/1936 and the property assigned under Ext.A1 was alloted to Ayisumma, the assignor under Ext.A1 as item No.5 of schedule 6 of that partition deed. If in fact the property obtained by legal heirs and divided and alloted to the assignor under Ext.A1 was not 32 X 36 but 41 X 45 six feet koles which alone enable the assignor to assign that property, that fact would have been stated in the partition deed. Even though appellants are claiming title under Ext.A1 and it is for them to prove that their assignor under Ext.A1 had title, to be transferred to their father under Ext.A1, the partition deed 1461/1936 by which the assignor

got the property was not produced. Learned counsel appearing for respondents made available a copy of the partition deed and submitted that the property alloted to the assignor under Ext.A1 is also not 41 X 45 six feet koles but only 32 X 36 six feet koles which is the property covered under Ext.A19 to A21. If that be the case, the question is whether appellants, who are claiming title under the father, under Ext.A1, could claim title over the additional extent of the property covered under Ext.A1, which is not covered under Ext.A19 to A21 or the registered partition deed 1461/1936. The argument of learned senior counsel could have been accepted if at least in Ext.A21 or the partition deed entered into by the legal heirs of the assignee under Ext.A21, has asserted that though the property shown under Ext.A19 to A21 was only 32 X 36 six feet koles in fact within the boundaries shown therein the extent is 41 X 45 six feet koles. Conspicuous absence of such a case, at least in Ext.A1, when the property was assigned by Ayisumma in

favour of the father of appellants cannot be ignored. In fact it is a crucial fact to decide whether appellants can claim title to the disputed portion of the property.

10. If by Ext.A19 to A21 one could have stated that entire plaint schedule property was covered by the document, it could have been stated that appellants have title to the plaint schedule property. The boundaries of the property transferred under Ext.A1 is Ettukandam paramba on the east and south and Chali paramba on the west and north. The property transferred under Ext.A19 is also portion of Ettukandam paramba with measurement 32 X 36 six feet koles. Therefore it can only be stated that the property transferred under Ext.A19 is a portion of Ettukandam paramba and on the east and south of the property so transferred is also portions of Ettukandam paramba. Ext.A20 by which Kammu transferred the right in favour of Marakkar, though shows survey number as 64/3, all other descriptions including the same measurements and

boundaries are incorporated in Ext.A20 also. When that right was transferred under Ext.A21 by the legal heirs of Marakkar, apart from the description shown in Ext.A20, resurvey number of the property was also shown as R.S.206/1. All other measurements and boundaries in Ext.A19 and A20 were followed in Ext.A21 also. Though the eastern and southern boundaries were shown as Ettukandam paramba, Ext.A21 does not show that the portions of Ettukandam paramba which form eastern and southern boundary of the property transferred thereunder is not in R.S.206/1. Therefore on the basis of Ext.A21 also it is not possible to hold that the property transferred under Ext.A21 is the entire extent in R.S.206/1. From the southern and eastern boundary of Ext.A21, the possibility of portion of Ettukandam paramba in R.S.206/1 forming part of eastern and southern boundary of the property cannot be ruled out. But when the daughter of Moideen, to whom the property obtained under Ext.A21 was alloted,

while transferrng that right under Ext.A1 has shown the eastern and southern boundary as portions of Ettukandam paramba in R.S.206/2 and 3 and R.S.206/7 respectively. Evidently it is to claim more extent than what was obtained under Ext.A21. When there is no evidence to prove that either Moideen or his legal heirs obtained right over the entire extent measuring 41 X 45 six feet koles, appellants cannot claim title to the property in addition to the extent covered under Ext.A19 to A21 namely, which was only 32 X 36 six feet koles. Therefore when Ext.A19 to A21 does not show that the assignor under Ext.A1 has title to any extent of the property above 32 X 36 six feet koles covered under Ext.A19, appellants cannot claim title to the disputed property by claiming title to 41 X 45 six feet koles.

11. Learned counsel appearing for appellant vehemently argued that Ext.C1 to C4 reports and plan show that on all the four boundaries, old compound wall is existing and in the plaint it was specifically pleaded that the

property obtained by the father of the appellants was enclosed within the boundary and therefore appellants have title to the entire property within the boundary and even if respondents or anybody else has right over any portion of that property, it is lost by adverse possession and limitation. First of all, title claimed is on the strength of Ext.A1 which in turn is based on Ext.A19 to A21. When appellants are setting up title and claiming that they and their predecessors have been in possession of the property on the strength of title, they cannot claim that they have been in possession of the disputed portion of the property with animus to possess it as against the true owner, especially when appellants never recognised any other true owner. Therefore the plea based on adverse possession will not stand.

12. When appellants have no specific case in the plaint that the property obtained under Ext.A1 was enclosed by an old compound wall and the property obtained under

Ext.A19, though shown as 32 X 36 was in fact 41 X 45 six feet koles and it is that property which was enclosed within the compound wall which was purchased by Kammu under Ext.A19 and thereafter sold to Marakkar under Ext.A20 and obtained by Moideen under Ext.A21, appellants are not entitled to claim that they have title to the additional extent of the plaint schedule property over and above 32 X 36 six feet koles as shown in Ext.A19 to A21. True, respondents cannot claim title under Ext.A18 without establishing the title of Khadiya Umma. It is also true that when under Ext.A21, legal heirs of Marakkar assigned whatever property Marakkar obtained under Ext.A20, no portion of the property obtained under Ext.A20 could have been retained by legal heirs of Marakkar to be assigned to the predecessor of respondents and on that strength, respondents are not entitled to claim title to the property. But failure of the respondents to prove their title will not enable appellants to get a decree for declaration of their

title to the disputed property. So also appellants cannot claim title under Ext.A22 Adangal extract. Adangal extract is not a document of title. Learned counsel appearing for respondents argued that under Ext.B3 and B4, respondents have title to the property. But it is under Ext.B5 as item No.35, a portion of Ettukandam paramba in R.S.206/1 with measurement 49 X 9 six feet koles was also divided between the legal heirs of Abdul Rahiman and alloted to one of the sharers. But Ext.B5 does not throw any light on what basis the said item was divided as available to the co-owners therein. Respondents also did not produce any document to prove that the executants of Ext.B5 derived title to the said 39 X 9 six feet koles of Ettukandam paramba. It is the right so obtained under Ext.B5 which was subsequently divided under Ext.B3 and B4. Therefore on the strength of Ext.B3 to B5 also respondents cannot claim title. Therefore on analysing the entire evidence, I do not find any reason to interfere with the finding of first appellate court that

appellants are not entitled to the decree for declaration or recovery of possession sought for.

Appeal is dismissed.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-

M.SASIDHARAN NAMBIAR, J

SA 654/ 1994

JUDGMENT

21.11.2007